

**PLAINTIFFS'
REPLY ISO THEIR
SUPPLEMENTAL
SANCTIONS
BRIEF PURSUANT
TO DKT. 624**

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1 **BOIES SCHILLER FLEXNER LLP**
2 David Boies (admitted *pro hac vice*)
3 333 Main Street
4 Armonk, NY 10504
5 Tel: (914) 749-8200
6 dboies@bsfllp.com
7 Mark C. Mao, CA Bar No. 236165
8 Beko Reblitz-Richardson, CA Bar No. 238027
9 Erika Nyborg-Burch, CA Bar No. 342125
10 44 Montgomery St., 41st Floor
11 San Francisco, CA 94104
12 Tel.: (415) 293-6800
13 mmao@bsfllp.com
14 brichardson@bsfllp.com
15 enyborg-burch@bsfllp.com
16 James Lee (admitted *pro hac vice*)
17 Rossana Baeza (admitted *pro hac vice*)
18 100 SE 2nd St., 28th Floor
19 Miami, FL 33131
20 Tel.: (305) 539-8400
21 jlee@bsfllp.com
22 rbaeza@bsfllp.com
23 Alison L. Anderson, CA Bar No. 275334
24 725 S Figueroa St., 31st Floor
25 Los Angeles, CA 90017
26 Tel.: (213) 995-5720
27 alanderson@bsfllp.com

1 **SUSMAN GODFREY L.L.P.**
2 William C. Carmody (admitted *pro hac vice*)
3 Shawn J. Rabin (admitted *pro hac vice*)
4 Steven M. Shepard (admitted *pro hac vice*)
5 Alexander Frawley (admitted *pro hac vice*)
6 1301 Avenue of the Americas, 32nd Floor
7 New York, NY 10019
8 Tel.: (212) 336-8330
9 bcarmody@susmangodfrey.com
10 srabin@susmangodfrey.com
11 sshepard@susmangodfrey.com
12 afrawley@susmangodfrey.com

13 Amanda K. Bonn, CA Bar No. 270891
14 1900 Avenue of the Stars, Suite 1400
15 Los Angeles, CA 90067
16 Tel.: (310) 789-3100
17 abonn@susmangodfrey.com

18 **MORGAN & MORGAN**

19 John A. Yanchunis (admitted *pro hac vice*)
20 Ryan J. McGee (admitted *pro hac vice*)
21 201 N. Franklin Street, 7th Floor
22 Tampa, FL 33602
23 Tel.: (813) 223-5505
24 jyanchunis@forthepeople.com
25 rmcgee@forthepeople.com

26 Michael F. Ram, CA Bar No. 104805
27 711 Van Ness Ave, Suite 500
28 San Francisco, CA 94102
29 Tel: (415) 358-6913
30 mram@forthepeople.com

31 **UNITED STATES DISTRICT COURT**
32 **NORTHERN DISTRICT OF CALIFORNIA**

33 CHASOM BROWN, WILLIAM BYATT,
34 JEREMY DAVIS, CHRISTOPHER
35 CASTILLO, and MONIQUE TRUJILLO
36 individually and on behalf of all similarly
37 situated,

38 Plaintiffs,
39
40 vs.
41
42 GOOGLE LLC,
43
44 Defendant.

45 Case No.: 4:20-cv-03664-YGR-SVK

46 **PLAINTIFFS' REPLY IN SUPPORT OF**
47 **THEIR SUPPLEMENTAL SANCTIONS**
48 **BRIEF PURSUANT TO DKT. 624**

49 Referral: The Honorable Susan van Keulen

1 Google's open defiance of this Court's orders continues, even *after* the Court sanctioned
 2 Google with exclusion of witnesses, adverse inferences and jury instruction, and nearly \$1 million.
 3 Google now *refuses* to comply with the Court's sanctions order ("Order") directing Google to
 4 "provide Plaintiffs with a representation in writing" that "other than the logs identified thus far as
 5 containing Incognito-detection bits, no other such logs exist." Dkt. 588 at 6. Remarkably, Google
 6 has "reconsider[ed]" what the Court's sanctions Order meant and concluded it was limited only to
 7 the three, specific Incognito-detection bits that Plaintiffs discovered and no others. Dkt. 696-1 ("2d
 8 Supp. Sramek Decl.") ¶ 7. Google therefore states that it has not and will not undertake the
 9 "multiple, months-long investigations that would have been required" into the existence of any
 10 *other* detection bits and logs. *Id.* Google's submission confirms, rather than undermines, Plaintiffs'
 11 request for additional sanctions, which are properly tailored to Google's additional misconduct.
 12

I. Google Defies the Court Again By Refusing to Investigate Incognito-Detection Bits.

13 Google admits that it initially read the Court's Order as requiring it to investigate the
 14 existence of *other* Incognito-detection bits. 2d Supp. Sramek Decl. ¶ 7. However, Google now
 15 claims to have "reconsider[ed]" its reading of the Court's Order in light of the Court's order setting
 16 the briefing schedule on this motion. *Id.*; Opp. at 3. Nothing in the briefing order limited the
 17 sanctions Order—the "disputed fields" it mentioned have always been *any* Incognito-detection
 18 bits. Dkt. 588 at 6. Google could have requested an extension, sought reconsideration (or even
 19 clarification), or appealed, but Google did none of those things. It instead once again applied
 20 "Google law" and gave itself a free pass on compliance with the Court's orders.

II. Mr. Sramek's Declaration Raises Serious Questions Regarding Google's Misconduct.

21 Mr. Sramek's declarations and a document Google recently produced raise serious
 22 questions regarding Google's deliberate and ongoing concealment of relevant discovery. On July
 23 21, 2022, Google for the first time produced an e-mail thread showing that beginning in September
 24 2021 a Google team including Mr. Sramek was already "auditing all clients across Google reading
 25 the X-Client-Data-header" by "using [REDACTED] to identify mentions of 'X-Client-Data' in code"
 26 and questioning the code owners. Declaration of Mark Mao, Ex. B. Mr. Leung responded to the
 27
 28

1 audit by asking whether X-Client-Data was “no longer a viable option” legally to “identify Chrome
 2 Incognito” and, if so, “what will be the suggestion of alternatives?” *Id.* Mr. Sramek was copied on
 3 responses indicating (1) “the policy comes from a commitment to external regulators” and (2)
 4 perhaps other “client-side signals” could be used to detect Incognito instead. *Id.* Multiple
 5 documents indicate Google had already been considering “adding client-side signals” that would
 6 track Incognito-usage, including [REDACTED].
 7 Mao Decl., Ex. C.¹ Did Google implement such other client-side signals in Google’s “proto”
 8 structure, or otherwise? Use those signals to log Incognito? Mr. Sramek refuses to investigate,
 9 limiting his investigation only to logs in which Google uses any field to infer private browsing,
 10 and only for the three bits that Plaintiffs identified. 2d Supp. Sramek Decl. ¶¶ 6–7.

11 Moreover, Google’s Senior Litigation Counsel on this matter was copied on the recently-
 12 produced e-mail thread. That thread includes redacted e-mails from Messrs. Leung and Liao on
 13 November 17, 2021—one day before Google’s deficient Golueke declaration omitting dozens of
 14 logs containing the three Incognito bits disclosed so far (and possibly many more).² Dkt. 338. This
 15 calls into serious question Google’s claimed inadvertence, as opposed to deliberate concealment.

16 III. Google’s Misconduct Has Prejudiced Plaintiffs.

17 Plaintiffs’ prejudice is confirmed by Google’s opposition. Google asserts that the
 18 belatedly-identified logs are “not accretive,” relies on declarations with thin untested substance,
 19 and leaves Plaintiffs and the Court with no way to test those assertions because no schema, fields,
 20 data, or additional documents regarding such logs have been produced. Google cannot dispute that
 21 as-yet undisclosed logs are “accretive” when (1) Google’s own documents show it was considering
 22 [REDACTED] and yet (2) Google refuses
 23 to investigate the existence of such bits and logs. Mao Decl., Ex. C.

24 With respect to the [REDACTED] logs that Sramek’s June 14 declaration belatedly disclosed, Google’s
 25 vague description also confirms their relevance: [REDACTED] are [REDACTED]

27 ¹ Another document refers to the fact that “Chrome has explored options that would also pass an
 ‘is incognito’ bit.” Mao Decl., Ex. D.

28 ² Litigation Counsel was only copied, so the Court should review the unredacted version *in camera*.

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Dkt. 614-2 ¶¶ 6-10. Google offers its un-tested say-so that *some* of the data in these logs may have existed in some other logs that Google *also* failed to timely and fully disclose. That is no answer, even if accepted. Why should Plaintiffs or the Court accept Google's say-so when the very purpose of the improperly-withheld discovery was to *test* such assertions *with evidence*? To allow Google's continued *ipse dixit* is to reward its misconduct. Nor does Google have a credible answer for one form of prejudice which is clear: its spoliation of data from the [REDACTED] newly-disclosed logs (let alone those logs that are still un-investigated and un-disclosed).³ Opp. 5. Google misrepresents the Court's sanctions Order as blessing its deletion of "Incognito-detection bit" data. *Id.* Not so: the Court noted there was no "basis for a finding that Google spoliated evidence" because "Google's counsel represented that 'all of the logs that contained these bits at issue have been included in the Special Master's preservation proposal.'" Dkt. 588. Google makes no such representation about *these* logs or *others* as to which it refuses to investigate.

Tellingly, Google no longer disputes that data flagged with an Incognito-detection bit in such logs *can* be joined with users' "authenticated" data to identify them. Opp. 6-7. Google merely argues that its "policy" forbids such joins.⁴ Google's failure to deny that such spoliated data *could* have been used to identify class members demonstrates prejudice and also begs the question: what *else* could Plaintiffs have done with such data and Google's arguments opposing class certification? Quantify how frequently individual class members "interact[ed] with ads" in

³ As the Court is aware from the preservation dispute—and confirmed by Google's documents—[REDACTED] Mao Decl., Ex. D at '254; Dkt. 546. Here, Mr. Sramek presumably looked within Google's schema and proto-structure for all such bits and customizable fields, but appears to refuse to share findings.

⁴ Mr. Sramek claims based entirely on inadmissible hearsay from another "Google engineer" that one such log includes both authenticated and unauthenticated data, but does not join the two together. 2d Supp. Sramek Decl. ¶ 10. He does not dispute that the log *can* join the two together. Nor does he name the Google engineer. Is it Mr. Leung, whom Google is precluded from relying on? Mr. Liao? Or another undisclosed witness? Either way, the Court should strike such hearsay.

1 Incognito? “[P]redict ad revenues” tied to class members? Confirm that class members did not
 2 block Google via obscure Chrome settings? Demonstrate that the full scope of how Google tracks,
 3 stores, and uses such data in a “highly offensive” way against the law? Google opposes class
 4 certification by faulting Plaintiffs for supposedly failing to do these things, all while concealing
 5 and spoliating logs that may have been used to do them. Google must be sanctioned to deter blatant
 6 violations of Court orders as a calculated litigation strategy.

7 **IV. Plaintiffs’ Requested Relief Is Warranted.**

8 **Exclusion of Sramek and Harren:** Google’s contention that Messrs. Sramek and Harren
 9 were only recently assigned to investigate Incognito-detection bits is belied by the recently
 10 produced e-mail. Google “fail[ed] to identify” them, “undermin[ing] Plaintiffs’ ability to obtain
 11 full discovery....” Dkt. 588 at 45. Exclusion is therefore automatic under Rules 26 and 37(c).

12 **Preclusion Under Rule 37(b):** Google’s *refusal* to investigate other Incognito-detection
 13 bits and log sources—all while continuing to present its untested say-so about what it supposedly
 14 does (and does not) do with such data—confirms the necessity of this relief. Google should not be
 15 permitted to say it “does not” do certain things with Incognito data when it refuses, in violation of
 16 multiple Court orders, to complete the investigations required to make such an assertion.

17 **Jury Instructions Under Rules 37(b) and 37(e):** Google only contests that jury
 18 instructions are warranted under Rule 37(e), not 37(b). Opp. 8. Rule 37(e) is also satisfied because
 19 Google has evinced an “intent to deprive [Plaintiffs] of the [Incognito-detection bits purposes] in
 20 the litigation.” *Best Label Co. v. Custom Label & Decal, LLC*, 2022 WL 1525301, at *2 (N.D. Cal.
 21 May 13, 2022). At this point, Google’s misconduct goes beyond “gross negligence.” *Meta*
 22 *Platforms, Inc. v. BrandTotal Ltd.*, 2022 WL 1990225, at *6 (N.D. Cal. June 6, 2022). Given
 23 Google’s admission regarding its failure to investigate *other* bits and log sources apart from the [REDACTED]
 24 logs, the proposed jury instructions are indisputably warranted.

25 **Additional Monetary Sanctions:** Google does not dispute the Court may award additional
 26 monetary sanctions and its brazen submission confirms they are warranted.

27 Plaintiffs request a hearing and that Mr. Sramek, Mr. Harren, and Senior Litigation Counsel appear.

1 Dated: August 25, 2022

Respectfully submitted,

2 By: /s/Mark C. Mao

3
4 Mark C. Mao (CA Bar No. 236165)
5 mmao@bsfllp.com
6 Beko Reblitz-Richardson (CA Bar No. 238027)
7 brichardson@bsfllp.com
8 Erika Nyborg-Burch (CA Bar No. 342125)
9 Enyborg-burch@bsfllp.com
10 BOIES SCHILLER FLEXNER LLP
11 44 Montgomery Street, 41st Floor
12 San Francisco, CA 94104
13 Telephone: (415) 293 6858
Facsimile (415) 999 9695

14 David Boies (*pro hac vice*)
dboies@bsfllp.com
15 BOIES SCHILLER FLEXNER LLP
333 Main Street
16 Armonk, NY 10504
Telephone: (914) 749-8200

17 James W. Lee (*pro hac vice*)
jlee@bsfllp.com
18 Rossana Baeza (*pro hac vice*)
rbaeza@bsfllp.com
BOIES SCHILLER FLEXNER LLP
100 SE 2nd Street, Suite 2800
Miami, FL 33130
Telephone: (305) 539-8400
Facsimile: (305) 539-1304

19 Alison L. Anderson (CA Bar No. 275334)
alanderson@bsfllp.com
20 BOIES SCHILLER FLEXNER LLP
725 S Figueroa St., 31st Floor
21 Los Angeles, CA 90017
Telephone: (213) 995-5720
Facsimile: (213) 629-9022

22 William Christopher Carmody (*pro hac vice*)
bcarmody@susmangodfrey.com
23 Shawn J. Rabin (*pro hac vice*)
srabin@susmangodfrey.com
24 Steven Shepard (*pro hac vice*)
sshepard@susmangodfrey.com
25 Alexander P. Frawley (*pro hac vice*)
afrawley@susmangodfrey.com
26 SUSMAN GODFREY L.L.P.
27
28

1301 Avenue of the Americas, 32nd Floor
New York, NY 10019
Telephone: (212) 336-8330

Amanda Bonn (CA Bar No. 270891)
abonn@susmangodfrey.com
SUSMAN GODFREY L.L.P.
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
Telephone: (310) 789-3100

John A. Yanchunis (*pro hac vice*)
jyanchunis@forthepeople.com
Ryan J. McGee (*pro hac vice*)
rmcghee@forthepeople.com
MORGAN & MORGAN, P.A.
201 N Franklin Street, 7th Floor
Tampa, FL 33602
Telephone: (813) 223-5505
Facsimile: (813) 222-4736

Michael F. Ram, CA Bar No. 104805
MORGAN & MORGAN
711 Van Ness Ave, Suite 500
San Francisco, CA 94102
Tel: (415) 358-6913
mram@forthepeople.com

Attorneys for Plaintiffs